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Date of Decision: 19th January 1996

CRIMINAL APPEAL NO. 1445 OF 1984

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

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Shri S.R. Divetia, Addl. Public Prosecutor, for the Apppellant

Shri S.D. Patel, Advocate, for the Respondent

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 19th January 1996)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of acquittal passed by the learned Additional Sessions Judge of Mehsana on 23rd August 1984 in Sessions Case No. 25 of 1984 is under challenge in this appeal at the instance of the prosecution. Thereby the learned trial Judge has acquitted the respondent herein (the original

accused) of the charge of commission of the offences punishable under sections 363, 366-A and 376 of the Indian Penal Code, 1860 (the IPC for brief).

2. The facts giving rise to this appeal move in a narrow compass. It is the case of the prosecution that one girl by the name of Hemlata was taken away by the accused on 12th August 1983 from the lawful guardianship of her grandfather. She was below the age of 18 at the relevant time. She was carried to different places like Himatnagar, Ambaji, Palanpur, Ajmer and Sidhpur. She was subjected to rape in the course of their journey to all these places. It appears that the grandfather of the girl gave his complaint on 13th August 1983 charging the accused of taking away her from his lawful guardianship. Thereupon the investigation machinery was set into motion. In the course of investigation the accused was apprehended on 4th September 1983. The investigating officer came to know from him that the girl was kept in the house of his paternal aunt at Sidhpur. Thereupon she was recovered from the house of the paternal aunt of the accused at Sidhpur on 4th September 1983 itself. After completion of the investigation, a charge-sheet was submitted in the Court of the learned Judicial Magistrate (First Class) at Mansa charging the accused with the offences punishable under sections 363, 366-A and 376 of the IPC. Since trial of both the offences was beyond the competence of the learned magistrate, the case was committed to the Sessions Court at Mehsana for trial and disposal. It came to be registered as Sessions Case No. 25 of 1984. It appears to have been assigned to the learned Additional Sessions Judge for trial and disposal. The charge against the accused was framed on 13th June 1984. He did not plead guilty to the charge. He was thereupon tried. After recording the persecution evidence and recording the further statement of the accused under sec. 313 of the Code of Criminal Procedure, 1973 (the Cr.P.C. for brief) and after hearing rival submissions, by his judgment and order passed on 23rd August 1984 in Sessions Case No. 25 of 1984, the learned Additional Sessions Judge of Mehsana acquitted the accused of the charge levelled against him. That aggrieved the prosecution. It has therefore preferred this appeal after obtaining leave of this Court for questioning the correctness of the judgment and order of acquittal passed by the learned trial Judge.

3. Learned Additional Public Prosecutor Shri Divetia has taken us through the entire evidence on record in support of his submission that the learned trial Judge was in error in coming to the conclusion that the prosecution had failed to establish its case against the respondent herein beyond any reasonable doubt. According to learned Additional Public Prosecutor Shri Divetia, the overwhelming evidence on record is eloquent enough to point unmistakably the finger of guilt towards the

respondent-accused. As against this, learned Advocate Shri S.D. Patel for the respondent has urged that, on proper appreciation of the material on record, the learned trial Judge has recorded the finding that the prosecution has not been able to establish its case beyond reasonable doubt. It has been urged on behalf of the respondent that the learned trial Judge has given cogent and convincing reasons in support of his judgment and order of acquittal and, since the view taken by the learned trial Judge is also possible on the basis of the evidence on record, this Court need not interfere with the judgment and order of acquittal in this appeal.

4. It would be quite proper at this stage to look at certain salient features of the case. It is not in dispute that the girl was residing with her grandfather on the date of the incident. As clearly transpiring from the evidence on record, she had gone to reside at her grandfather's place about a month or two prior to the incident. The grandfather has been examined as Prosecution Witness No.2 at Ex. 16. He has unequivocally stated that she was the second child of his son, named, Pravinkumar, working as a driver in the S.T. Corporation at Gandhinagar. It is immaterial whether she was forced to reside with him or she had opted to reside with him out of her own volition on account of her warring parents at Gandhinagar. The grandfather in his testimony at Ex. 16 has denied that his daughter-in-law, named, Dakshaben (mother of the girl), went to reside separately from her husband, the father of the girl, taking with her another daughter by the name of Kashmira. Whether or not it was so is not relevant for the purpose of deciding the fate of this appeal. The fact however remains that the girl was residing with her grandfather on the date of the incident.

5. The learned trial Judge has expressed his doubt about the age of the girl. According to him, she could be between 16 and 18 years in age. Learned Advocate Shri Patel for the respondent has heavily relied on the reasoning adopted by the learned trial Judge for coming to the aforesaid conclusion in support of his submission that we need not interfere with the judgment and order of acquittal in this appeal. According to learned Additional Public Prosecutor Shri Divetia, the reasoning given by the learned trial Judge in that regard can be said to be nothing but perverse.

6. The prosecution has brought on record the birth certificate of the girl as appearing in the birth register maintained by the Municipal Corporation of Ahmedabad. An extract therefrom is at Ex. 8 on the record of the case. It is an admitted position on record that the name of the father of the girl is Pravinkumar and that of her mother Dakshaben. Her grandfather at Ex. 16 has unequivocally stated that she was the

second child of her parents. Her father was admittedly the eldest son of the witness at Ex. 16, that is, the grandfather of the girl. The extract from the birth register at Ex. 8 on the record of the case unmistakably shows that the new-born was a female child and the second child of her parents. Her date of birth is shown therein to be 19th September 1968. It transpires therefrom that information in that regard was given by one K.C. Joshi. This birth-date on record would clearly go to show that the girl was born on 19th September 1968. It is true that the name of the new-born is not mentioned therein. We cannot overlook the tradition by and large operating in India that the new-born is baptised or christened after some time and not soon after his or her birth. Ordinarily, the name-giving ceremony is performed on the 6th day of the birth. However, at times the name of the child is not fixed for quite some time. In that view of the matter, absence of the child's name in the extract from the birth register at Ex. 8 would not be of much consequence.

7. Non-examination of the author of the entry in the birth register is also of not much consequence in view of the binding ruling of the Supreme Court in the case of Harpal Singh and another v. State of Himachal Pradesh reported in AIR 1981 Supreme Court 361.

8. It may be mentioned at this stage that the grandfather of the girl at Ex. 16 is not at all cross-examined on the point that she was his grand-daughter born out of the wedlock between his son Pravinkumar and his wife, named, Dakshaben as the second child of the marriage. In view of this undisputed position arising from the record of the case, there is no escape from the conclusion that the extract from the birth register at Ex. 8 will furnish the conclusive proof of the girl's age. As stated hereinabove, her birth-date as recorded therein was 19th September 1968. On the date of the incident she was therefore aged 14 years 10 months and 23 days.

9. The learned trial Judge has taken into consideration the discrepancy found in the date of her birth as recorded in her school record as transpiring from her school leaving certificate at Ex. 7. Therein her birth-date is recorded as 15th August 1968. When the more reliable proof of her birth-date is available in the form of an extract from the birth register, it is not necessary to rely on the birth-date recorded in her school register, more particularly when the difference is hardly of 34 or 35 days. It is possible that at the relevant time the age of a child to be admitted to school was relatable to the cut-off date of 31st August. If her birth-date as found in the extract of the birth register at Ex. 8 was taken into consideration, she could not have been admitted to school on account of the cut-off date of 31st August of the concerned

year. It is not uncommon that the birth-date of a child is advanced to a certain extent with a view to saving one precious academic year. It is possible that, in order to admit the child to school to save her precious one year, the birth-date of the child was required to be advanced in such a manner as to fall within the cut-off date of 31st August. That appears to be the reason why in the school record her birth-date was shown to be 15th August 1968 and not 19th September 1968 as found in the extract of the birth register at Ex. 8.

9. We know that conjunctures, hypotheses and/or surmises have no play in the criminal trial as such. We also know that no explanation has been brought on record by or behalf of the prosecution with respect to discrepancy of the birth-date recorded in the extract from the birth register at Ex. 8 and the school leaving certificate at Ex. 7. Since the difference found is of 35 days only, we have permitted ourselves to travel in the realm of conjunctures, hypotheses and surmises. This is based on human behavior and conduct as is commonly known. With respect, the learned trial Judge has made no attempt to explain away such discrepancy. Besides, as indicated by us hereinabove, the birth-date recorded in the birth register maintained by a local authority like the Municipal Corporation of Ahmedabad would furnish a more reliable proof of the age of the child mentioned therein rather than the birth-date recorded in her school register. We are of the opinion that the extract of the birth register at Ex. 8 would prevail over the school leaving certificate at Ex. 7 so far as the birth-date of the girl in this case is concerned. In this view of the matter, we have to accept the birth-date as recorded in the document at Ex. 8 and it is 19th September 1968. She was therefore aged 14 years 10 months and 23 days on the date of the incident.

10. We are supported in our view by the Division Bench ruling of the Kerala High Court in the case of Krishnarajan v. Doraswamy Chettiar and others reported in AIR 1966 Kerala 305. It has been held therein that entries in the birth register furnish the best evidence of the date of birth and can safely be accepted unless they are shown to be wrong. It has further been observed therein that birth entries in the registers of public schools, though relevant under sec. 35 of the Evidence Act, 1872, are of far less evidentiary value and of little avail to show the correct age of the person concerned. We are in respectful agreement with the aforesaid principle of law enunciated by the Division Bench of the Kerala High in its aforesaid ruling in the case of Krishnarajan (supra). The aforesaid Division Bench ruling of the Kerala High Court cannot and need not be distinguished on the ground that it was rendered in a civil case and not in a criminal case. What has to be culled out from its reading is the principle of law it has enunciated.

11. Even if her birth-date as recorded in the school leaving certificate at Ex. 7 is taken, on the date of the incident she was aged 14 years 11 months and 27 days. In either view of the matter, the girl was below the age of 15 years on the date of the incident. With respect, the learned trial Judge has not focussed his attention on this aspect of the case. Such omission on his part has resulted in his reaching an incorrect conclusion with respect to her age.

12. Relying on the reasoning given by the learned trial Judge, learned Advocate Shri Patel for the respondent-accused has heavily relied on the medical evidence in support of his submission that the girl was not a minor at the relevant time. The medical evidence on record is in the form of the oral testimony of Dr. R.B. Patel at Ex. 13 and the certificate issued by him at Ex. 14. In the medical opinion, the age of the girl was 14 to 16 years. Relying on the principles contained in the medical jurisprudence, it has been urged that the difference of two years in the age found in the medical opinion will have to be taken into consideration. In that view of the matter, learned Advocate Shri Patel for the respondent-accused has urged that the girl could be about 18 years in age.

13. With respect, we are unable to accept this submission for several reasons. In the first place, as indicated hereinabove, we have a more reliable proof of her age furnished by the extract from the birth register at Ex. 8. When a more reliable proof of her age is available, it is not necessary to determine her age in the context of the medical evidence on record. Besides, the medical evidence with respect to her age is in the form of an opinion. There is no certainty of the correct age as found in the medical opinion. The difference would be to the tune of plus or minus two years in accordance with the principles stated in the medical jurisprudence. Dr. Patel in his oral testimony at Ex. 13 has clearly stated that her age could not be more than 16 years. He has not been subjected to any cross-examination. In that view of the matter, the clear-cut medical opinion was to the effect that the girl was not above the age of 16 years. The difference in age will have therefore to be accepted on the lower side of the age. In that view of the matter, her age could be even 12 years if we go by the medical opinion. We are therefore unable to accept the submission urged before us by learned Advocate Shri Patel for the respondent-accused that the girl was not a minor at the relevant time in view of the medical evidence on record.

14. It is true that the minor girl in her deposition at Ex. 18 is found to have somewhat exaggerated the case. She has stated that she and the accused went on foot from Mansa to

Gandhinagar. It transpires from the material on record that the distance between the two places was roughly 32 Kilometers. According to her, they left Mansa at about 8 p.m. and reached Gandhinagar at 4 a.m. the next day. It would be difficult for a person to cover a distance of 32 Kilometers on foot in about 8 hours unless he is a champion in walking or running. That might be an exaggeration on her part.

15. At this stage it may be mentioned that she was in the company of Shantaben Virabhai (Prosecution Witness No. 9 at Ex. 29). She (Shantaben) has clearly deposed that the accused had come there at the relevant time on his bicycle and Hemlata was carried by him on the carrier of his bicycle. It appears that one Bhikabhai Kalidas (Prosecution Witness No. 6 at Ex. 22) had also seen both the accused and the girl together on his bicycle. He has clearly deposed so in his oral testimony at Ex. 22. He has denied the suggestion that he had heated exchange of words with the accused at the relevant time. Even if that be so, such heated exchange of words would not make him a witness inimical or hostile to the accused. So far as Shantaben at Ex. 29 is concerned, she was aged 17 years at the time of her deposition. She has fairly stood her ground well in her cross-examination with respect to her deposition to the effect that the accused carried Hemlata on his bicycle at about 8 p.m. on 12th August 1983 from Mansa. In view of this evidence on record, some exaggeration onthe part of the prosecutrix need not be overemphasised.

16. That brings us to the question as to what offence, if any, was committed by the respondent-accused at the relevant time. As found by us, she was a minor at the relevant time. She was admittedly in the lawful guardianship of her grandfather. Even if the defence version is believed that she was subjected to unduly strict discipline and restraint and she was unhappy on that account and she therefore wanted to go to her father's house, there was no reason for the respondent herein to carry her to different places like Himatnagar, Ambaji, Palanpur, Ajmer and Sidhpur. She could have been left at her father's place at Gandhinagar. In his further statement under sec.313 of the Cr.P.C., the respondent herein has come out with a case that after reaching Gandhinagar she showed reluctance to go to her father's place and requested him to carry her to some other place. Even if that case of his is believed, he had no reason to carry her to different places as mentioned hereinabove. If she did not want to go to her father's place, she could have been carried to her mother's house. Even if she was reluctant in going to her mother's house, she could have been carried to some place like Nari Vikas Gruh or Nari Samrakshan Gruh meant for girls like her. The fact that she was carried to different places mentioned hereinabove is not in dispute. The minor girl (Hemlata) has clearly stated in her

deposition at Ex. 18 that the accused carried her to Himatnagar, Ambaji, Palanpur, Ajmer and Sidhpur. The accused himself has admitted in his further statement under sec. 313 of the Cr.P.C. that he carried the girl to different places mentioned hereinabove. He was admittedly a married man having a daughter also. He was admittedly residing as a tenant in the house of the grandfather of the minor girl in question. He was residing on the first floor. He could have very well known that the minor girl (Hemlata) was a minor at the relevant time. In that view of the matter, he ought not to have carried her to any place other than her father's house or her mother's house even if she implored him to relieve her from the strict disciplinarian guardianship of her grandfather. Even if the minor girl wanted to accompany him to different places and her volition was treated by him as her consent, such consent of a minor is no consent in the eyes of law. In fact, the suggestion of the defence to the minor girl in her evidence at Ex. 18 was to the effect that all that she did in leaving her grandfather's guardianship was out of her own volition and not out of any compulsion or allurement on his part. That might be so though the minor girl at Ex. 18 has denied such suggestion. Even then the respondent hereinabove at the relevant time ought to have realised that it was like playing with fire. He ought to have realised that the minor's consent was no consent in the eyes of law. In that view of the matter, we accept the submission urged before us by the learned Additional Public Prosecutor for the State that the prosecution has clearly established that the respondent herein took away the minor girl (Hemlata) from the lawful guardianship of her grandfather on 12th August 1983. That would certainly amount to kidnapping a minor girl from lawful guardianship within the meaning of Sec. 361 of the IPC.

17. The minor girl in her oral testimony at Ex. 18 has clearly stated that the respondent herein had sexual intercourse with her during their visit to different places like Himatnagar and Ajmer. In her first police statement, she has not given the names of places where they had sexual intercourse. It has however come on record that she has clearly stated even in her first police statement that the accused had sexual intercourse with her. A suggestion was made to her in the last paragraph of her cross-examination that it was done out of her own volition and not out of any compulsion or coercion. Once we come to the conclusion that she was a minor girl below the age of 15, consent on her part would not be material in view of the sixth clause of sec. 375 of of the IPC. In the case of a minor girl below the age of 15, sexual intercourse even with her consent would amount to rape within the meaning of the aforesaid statutory provision. In that view of the matter, we have to accept the submission urged before us by learned Additional Public Prosecutor Shri Divetia to the effect that the prosecution has also established its case of the offence

punishable under sec. 376 of the IPC.

18. Learned Advocate Shri Patel has heavily relied on the contradictions found in the first police statement given by the minor girl. As transpiring from her cross-examination in paragraphs 9 and 10 at Ex. 18, her first police statement was full of certain vital omissions. She has however clearly unfolded her version in her second police statement. It may be noted that she was a minor at the relevant time. She was suddenly recovered from Sidhpur from the house of the paternal aunt of the accused. On seeing the police, perhaps she might have become panicky. Her first police statement was recorded soon after her recovery as transpiring from the material on record. At that stage she might not have been in a proper frame of mind to give the account of what transpired between 12th August 1983 when she left Mansa and 4th September 1983 when she was found in the house of the paternal aunt of the accused. She might have in that state of mind omitted to mention certain vital facts. She has come out with the whole account in her subsequent police statement and she has not been contradicted with respect to her second police statement. It is not suggested to the minor girl in her deposition at Ex. 18 or to her grandfather in his deposition at Ex. 16 that the second police statement of hers was a tutored one. In that view of the matter, contradictions found in her first police statement need not be overemphasised.

19. A reference deserves to be made to the binding ruling of the Supreme Court in the case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat reported in AIR 1983 Supreme Court 753. Guidelines with respect to appreciation of the evidence of a minor girl as a victim of the offence punishable under sec. 376 of the IPC have been laid down. After setting out several reasons why a female might level false accusations as regards sexual molestation as conceivable in the Western society, the Apex Court has observed:

> By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because:- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to

> admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours, (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.

Appreciating the minor girl's deposition at Ex. 18 in the light of the aforesaid guidelines furnished by the Apex Court, we have to come to the conclusion that the respondent herein was guilty of the offence punishable under sec. 376 of the IPC.

20. In view of our aforesaid discussion, we are of the opinion that the prosecution has proved beyond reasonable doubt that the respondent-accused was guilty of the offences punishable under sections 366 and 363 read with sec. 361 and 376 of the IPC. With respect, the learned trial Judge has gone wayward in coming to the contrary conclusion.

21. On the question of sentence we have called upon learned Advocate Shri S.D. Patel for the respondent-accused. He has submitted that the incident was nearly 16 years old and the judgment of the acquittal was also passed some 12 years ago. According to learned Advocate Shri Patel for the respondent, it

would not be desirable to impose any substantive punishment of imprisonment on the respondent so as to unsettle him in his life. It has also been urged on behalf of the respondent-accused that the accused was a mere cycle repairer at the relevant time and it will not be desirable to burden him with any imposition of fine.

22. Taking into consideration that the accused at the relevant time was a married person of 26 years in age and has played with the modesty of the minor girl of about 15 years and considering the further fact that he as her neighbour in her grandfather's house has taken advantage of such familiarity, we think that the minimum punishment prescribed under sec. 376 of the IPC deserves to be imposed on him. Imposition of such minimum punishment would prove a deterrent not only to the respondent-accused but to such persons in the society who would like to exploit the modesty of a minor girl taking advantage of familiarity on account of diverse reasons like residence in the neighbourhood as in this case. Section 376 of the IPC also ordains us to impose a fine on the accused. He deserves to be punished with a fine in the sum of Rs. 5000 in default imprisonment for one year more. We do not propose to award any separate sentence for the offences punishable under sec. 363 and 366 read with sec. 361 thereof.

23. In the result, this appeal is accepted. The judgment and order of acquittal passed by the learned Additional Sessions Judge of Mehsana on 23rd August 1984 in Sessions Case No. 25 of 1984 is quashed and set aside. The respondent-accused is convicted of the offences punishable under sec. 363 and 366 read with sec. 361 and 376 of the IPC. A sentence of rigorous imprisonment for 7 years and fine of Rs. 5000 in default rigorous imprisonment for one year more is imposed on the respondent-accused for the offence punishable under sec. 376 of the IPC. No separate sentence is imposed for the offence punishable under sec. 363 and 366 read with sec. 361 of the IPC. The Learned Sessions Judge of Mehsana is directed to issue a warrant for arrest of the respondent herein for serving out the sentence imposed by us on him by this judgment and order of ours. The muddamal articles may be disposed of as directed by the learned trial Judge in his impugned judgment and order.
